To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled:

1. This is the Petition of Graham Nassau Gordon Senior-Milne (formerly Milne), Baron of Mordington, of 39 Castle Street, Norham, Northumberland TD15 2LQ, and shows as follows.

   Note: The petitioner's address for correspondence is Eastbury, The Lees, Challock, Ashford, Kent TN25 4DE. E-Mail: grahamngm@john-lewis.com. Tel: 01233 740542.

2. That in 1672 the dowager Countess of Northumberland petitioned the House of Lords to complain that a certain James Percy, a trunk maker, had falsely assumed the title of Earl of Northumberland and that this petition was referred to and heard by the Committee for Privileges (William Cruise, *'A Treatise on the Origin and Nature of Dignities or Titles of Honour'*, Joseph Butterworth & Son, London, 1823, p. 257). This shows that a person can petition the House to complain about someone falsely using a title or holding himself out as a peer. I mention this to counter any idea that it is worth trying to argue that such petitions are somehow invalid or impermissible or not within the jurisdiction of the House of Lords.

3. That, as the holder of a Scottish feudal barony, I previously petitioned the House to be recognised as a peer. **This petition is not a repeat of that petition in any way** and, in fact, is based on the assumption (which can be challenged of course) that the rejection of my earlier petition was correct. In a sense, it is the opposite of my previous petition and only asks that the logical (and legal) consequences of that rejection should be put into effect, as in all justice they should be, in accordance with the principle of equal treatment under the law.

4. That it is, nonetheless, necessary to consider the handling of my previous petition, as I do below, because there appears to be nothing to prevent this petition from being handled in the same way as my previous petition, except the arguments advanced below.

5. That I sent my previous petition to Lord McFall of Alcluith, Chairman of the Committee for Privileges, in accordance with the advice of the Crown Office quoted in Mereworth v Ministry of Justice [2011] EWHC 1589 (Ch) at 3 (http://www.bailii.org/ew/cases/EWHC/Ch/2011/1589.html):

   'The response of the Crown Office of the House of Lords was that the result of section 1 of the House of Lords Act 1999 was that Lord Mereworth was not entitled to a Writ of Summons because he was a hereditary peer. Lord Mereworth persisted with his request and by letter of 22 October 2010, the Head of the Crown Office said that: "If you consider that the Crown Office has withheld a writ of summons which you are entitled to receive, then, given that this is a matter relating to the membership of the House of Lords, you should contact the Chairman of the Committee for Privileges and Conduct, House of Lords, London SW1A OPW."'

6. That, in response to my petition, Lord McFall of Alcluith wrote to me in an E-Mail dated 10/1/2018:

   'Having reviewed the case, I am satisfied that because your feudal barony is not an hereditary peerage, neither the jurisdiction nor the standing orders of the House of Lords are engaged. The Clerk of the Parliaments therefore acted properly in refusing to accept your petition. As far as the House of Lords is concerned, the matter is now closed.'

7. That my petition was blocked at that point and was never presented to the House of Lords, even though the right to petition Parliament is a fundamental constitutional right and that if a petition can be blocked (for whatever reason), then the right is quite simply not a right. If a right is subject to someone's discretion (and Lord McFall has not shown any authority for his

assertion that the question of whether a feudal barony is a peerage is outside the jurisdiction of the House of Lords, especially given that the very same question has been considered by the House of Lords many times before*), then it is not a right, it is a favour, and the petitioner is not someone demanding something he is entitled to, he's a supplicant pleading to be given something which the giver can refuse to give him. Given that a right is, by definition, something that cannot be denied, because a person is entitled to it, if the thing can be denied then it is not a right. This means that Lord McFall of Alcluith, has determined, on his own authority, that there is, in effect, no fundamental constitutional right to petition Parliament (or equivalent body if prior to the establishment of Parliament), something that has been done since before the Norman Conquest, because there is nothing to prevent a member of either House from simply blocking a petition on his own authority, which is what Lord McFall of Alcluith did. Erskine May (*'A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament'*, 1851, Ch. 19, p. 381), the authority on parliamentary procedure and practice, states (and I assume that the current version, the 24th edition, says the same) (my emphasis): *'The right of petitioning the Crown and Parliament for redress of grievances is acknowledged as a fundamental principle of the constitution.'*

*Peerage claims based on feudal baronies include Arundel (1433), Abergavenny (1604), Fitzwalter (1670), Somerville (1723), Sutherland (1771), Berkeley (1861) and Mar (1867), and three of these recognised feudal baronies as peerages (Arundel, Berkeley and Mar), so Lord McFall's statement is manifestly false.

8. That I referred the matter to the Lord Speaker (Lord Fowler) but in an E-Mail to me dated 15/1/2018 he replied:

   'As the Senior Deputy Speaker said to you in his email of 10 January, as far as the House of Lords is concerned, the matter is now closed. By "the matter", he meant your complaint against the Clerk of the Parliaments but also all aspects of your attempts to refer your claim to a feudal barony to this House.'

9. That in reply to a Freedom of Information request dated 13/11/2018 as to *'whether any person/office holder has a right to prevent a petition submitted to the House from being presented to the House'*, the House of Lords replied (FOI 3138): *'There are no formal documented procedures in respect of preventing a petition from being considered by the House.'* This means that there is no formal documented procedure which expressly allows a peer to refuse to present a petition, so if a peer were to ask the House of Lords authorities 'Is there any rule which allows me to refuse to present to the House a petition which I have been asked to present?', the House of Lords authorities would have to answer 'There is nothing which expressly allows you to refuse to present a petition.' However, the webpage on the parliament.uk website *'Ask your MP to present a petition'* (https://www.parliament.uk/get-involved/sign-a-petition/paper-petitions/) says: *'Petitions can be presented only by members of the House of Lords, but they are not obliged to do so.'* So, while a member is not obliged to present a petition when asked to do so, can he actively block a petition which he has been asked to present?

10. It is quite extraordinary that the House of Lords has no effective mechanism which guarantees people their most important constitutional rights (after the right of access to the courts); the right to petition Parliament. How can this possibly be? When they were drafting the rules on petitions, did it not occur to them that if members are not obliged to present petitions, this makes the right to petition meaningless? Sir William Blackstone (*'Commentaries on the Laws of England'*, (1765-1769), Book 1, Chapter 1) identifies the absolute rights of the individuals, which are essentially:

    - Life and limb (essentially security of the person from harm)

- Reputation or good name
- Personal liberty
- Property

These rights are secured by:

- The constitution and the powers and privileges of Parliament
- Limitations on the royal prerogative (that is, the power of government to act on its own authority)
- The right of access to the courts
- The right to petition the King/Parliament
- The right to bear arms

So, the right of access to the courts and the right to petition are the highest personal rights which guarantee the foregoing absolute rights of the individual.

And Lord McFall and Lord Fowler have denied me both of these.

11. Given that a petition can only be presented to the House of Lords by a member of the House of Lords (*Companion to the Standing Orders*, para. 3.67), to allow a member to refuse to present a petition which he has been asked to present is to allow a member to deny a person his fundamental constitutional right to petition Parliament, even if that person might be able to find some other member to present his petition. This is so because if one member can refuse to present a petition to the House, then every other member of the House can also refuse *seriatim* (one after the other) to present a petition. To allow any or all of the members of the House to deny a person his fundamental constitutional right to petition Parliament renders the right meaningless. It is meaningless to give someone a right if they do not also have a means of asserting that right*, so it follows that the means of asserting the right must be **mandatory** in that the person responsible for implementing that means (and petitions can only be presented to the House of Lords by members of the House) cannot refuse to do so; if he can we are back to square one (where a right is subject to someone's discretion and is therefore not a right at all).

*'*For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting these rights, when wrongfully withheld or invaded.'* (Sir William Blackstone, *'Commentaries on the Laws of England'*, (1765-1769), Introduction, Section 2, *'Of the Nature of Laws in General'*). *'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.'* (Ashby v White (1703) 1 Sm LC (13th ed, 1929) 253).

12. This general principle that a right must be accompanied a means of asserting that right was upheld on appeal by the House of Lords in Ashby v White, so it is the law of the land; in other words, it is unlawful not to have a means of asserting a right. The House of Lords has therefore ruled, in effect, that it is unlawful for the House of Lords to allow a member to refuse to present a petition when he is asked to do so, because if one member can refuse then all can refuse, and if all refuse can then there is no guaranteed way of asserting the right, and not to have a guaranteed way of asserting a right is unlawful. The question is a simple one: 'Is there an effective (that is, reliable, which means mandatory) way of asserting the right?' If the answer is 'No' then the House of Lords is breaking the law.

13. But there is a difference between the procedural issue of presenting a petition and what Lord McFall did, which was, in effect, to determine (rule upon the merits of) my petition. This goes beyond merely denying access to the House of Lords as a court of law (which he did as well of course), it amounts to usurping the jurisdiction of the House of Lords by claiming to have the

authority to do something (rule upon the merits of a petition) which it is clear only the House itself has the authority to do. So, Lord McFall was not just denying me access to the court (House of Lords), he was acting as if he was the court (House of Lords). This is contempt of Parliament. By way of illustration, court staff can often exercise the powers of the court to reject applications to the court but they can only do this on procedural grounds (such as failure to pay a court fee), what they cannot do is to determine (rule upon the merits of) an application to the court (unless, perhaps, the application itself is purely procedural). The core power of the court, which is to rule upon the merits of an application/case, is reserved to the court. If a member of court staff pretends to have the authority to determine (rule upon the merits of) an application/claim, then he is pretending, in effect, to be the court.

14. That, as a result, the Lord Speaker agrees with Lord McFall of Alcluith that Erskine May, the recognized authority on parliamentary procedure, is wrong and that, contrary to what Magna Carta and the Bill of Rights say, there is no fundamental constitutional right to petition Parliament*. Necessarily, he also agrees that a Scottish feudal barony is not a peerage.

    Erskine May cites the Bill of Rights 1688 ('Right to petition - That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall.'*) and Magna Carta 1297 (*'No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right* [my emphasis].*'*). *'Nor will we deny or defer to any man either justice or right'* means that it is unlawful (a breach of clause 29 of Magna Carta 1297, which is still in force*) to prevent a person from exercising his fundamental constitutional right to petition Parliament.

    *http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/XXIX

15. That the Lord Speaker (Lord Fowler) and Lord McFall of Alcluith must also agree (1) that the fundamental constitutional right to have your legal rights and obligations determined in a court of law (the right of access to justice*) and (2) that the right under Article 6 of the European Convention on Human Rights (ECHR) to have your civil rights and obligations determined by *'an independent and impartial tribunal established by law'* do not apply to peerage claims because individual members of the House of Lords have the right, according to them, to prevent such claims from even reaching the House of Lords, even though the House of Lords has exclusive jurisdiction in such claims (which means that if a claim is not heard by the House of Lords, it cannot be heard anywhere - which is a complete denial of access to justice). One thing is certain and that is that Lord McFall of Alcluith and the Lord Speaker have no authority whatsoever to determine what is and is not within the jurisdiction of the House of Lords. To attempt to do so is contempt of Parliament. Given that Parliament acts as a court of law in peerage claims, it is also contempt of court**.

    *In R. v Secretary of State for the Home Department ex p. Leech No.2 [1993] EWCA Civ 12 (http://www.bailii.org/ew/cases/EWCA/Civ/1993/12.html) it was said (my emphasis):

    *'Now we turn to a principle of greater importance. It is a principle of our law that every citizen has a right of **unimpeded** access to a court. In Raymond v. Honey, supra, at 13A, Lord Wilberforce described it as a "basic right". Even in our unwritten constitution it must rank as a constitutional right.'*

    **In Raymond v Honey [1981] UKHL 8 (http://www.bailii.org/uk/cases/UKHL/1981/8.html) it was said (my emphasis)

    'In considering whether any contempt has been committed by the appellant, there are two basic principles from which to start. First, any act done which is calculated to obstruct or interfere

with the due course of justice, or the lawful process of the courts, is a contempt of court. These are the well-known words of Lord Russell of Killowen C.J. in Reg. v. Gray [1900] 2 Q.B. 36, 40.

Since 1900, the force of this principle has in no way been diminished. In A.-G. v. Times Newspapers Ltd. [1974] A.C. 273, Lord Diplock, with whom Lord Simon of Glaisdale agreed, clearly stated that to inhibit suitors from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced by courts of law, could amount to contempt of court (1.c. p.310): whether the particular action there involved had that effect is immaterial to the present case. The principle has been strongly affirmed by the European Court of Human Rights in the case of Golder (1980) 1 E.H.R.R. 524. The court there decided that access to a court was a right protected by Article 6 of the European Convention, and, while not expressly ruling upon the compatibility with the Convention of Rules 33, 34 and 37 of the Prison Rules 1964 (as to which see below), and while accepting that the right might be subject to limitations, applied this ruling to a convicted United Kingdom prisoner, who (inter alia) wished to direct proceedings against a member of the prison staff, and to a hindrance of a temporary character.

The action of the appellant was clearly such as to deny, albeit temporarily, the respondent's right of access to the court and, on the principle above stated, constituted a contempt.'

16. That the assertion that a Scottish feudal barony is not a peerage can only have been based on an opinion of the Lord Lyon (Dr. Joseph J. Morrow QC LLD) stated in his letter of 20/3/2017 to Elaine Chilver of the Crown Office, since this was the only advice of any sort obtained in respect of my petition, in which he wrote:

    'The essential information is that such feudal baronies can be bought and sold and have never been understood to form part of the peerage in Scotland.'

    He went on to say that *'in peerage law there is a grant to a specific person'*, which can only mean that, in his view, if there no grant directly to a person then there is no grant of a peerage. With feudal baronies, of course, there is no grant of a title to a person, the land is 'erected into a barony' and the lands and barony (which is attached to the land) are then granted to a person, so that the person holds the title by virtue of holding the lands.

17. That this opinion was sufficient for the Lord Chancellor to reject my peerage claim to him*, which means that he was satisfied that there is no doubt that a Scottish feudal barony is not a peerage.

    *A petition is initially submitted to the Lord Chancellor. In cases of doubt the Lord Chancellor refers a petition to the Committee for Privileges. If the Lord Chancellor refuses the petition and does not refer it to the Committee for Privileges, the petitioner can petition the House of Lords, which is what happened in my case.

18. That the above shows that the Lord Lyon, the Lord Chancellor, the Clerk of the Parliaments, the Lord Speaker and the Chairman of the Committee for Privileges all agree that a Scottish feudal barony is not and never was a peerage, though not one of them, including the Lord Lyon (as shown below), is an expert in Scottish peerage law. The last four also agree that I have no right to even claim that a Scottish feudal barony is a peerage, in spite of numerous peerage claims based on feudal baronies (both English and Scottish) having been heard by the House of Lords in the past, including Arundel (1433), Abergavenny (1604), Fitzwalter (1670), Somerville (1723), Sutherland (1771), Berkeley (1861) and Mar (1867). In other words, it looks like these four individuals are doing something (blocking a peerage claim) which has not been done in 600 years. In one of these cases (Berkeley 1861) it was ruled that an English feudal barony (The Barony of Berkeley) was a peerage, or, at least, that the feudal peerage had been converted into a personal peerage, a barony by writ, by the Tenures Abolition Act 1660*. In another case

(Mar 1867) it was found that a Scottish feudal barony was a peerage, and this was recognised by an Act of Parliament (Earldom of Mar Restitution Act 1885). In another case (Arundel 1433) an English feudal earldom (the Earldom of Arundel) was recognised as a peerage. So, three peerage claims in the House of Lords have actually ruled that a feudal barony is a peerage.

*In the Berkeley Peerage Case of 1858-1861, Lord St. Leonards said (The Berkeley Peerage (1858-1861), VIII, HLC, 118-119): *'The right to sit* [in the House of Lords] *is saved* [by s.10 Tenures Abolition Act 1660]*, but it no longer depends upon the tenure which is extinguished. The title of Honor was left as a substantive personal right. The tenure was not saved in the particular instance in order to save the title of Honor, but the title of Honor was itself saved although the tenure was destroyed.* [...] *There is, indeed, a Barony of Berkeley, not depending on tenure still existing.'*

19. That I consider myself bound to note the following, so that I will not be accused of concealing material that is unfavourable to this petition.

20. That the Lord Lyon's opinion that a Scottish feudal or territorial barony is not and never was a peerage, is flatly contradicted by several institutional writers (all those that I have consulted), including the greatest Scottish jurist, Lord Stair, in his *'The Institutions of the Law of Scotland'* (Bell & Bradfute, Edinburgh, 1832, Vol. I, II.3.1) and Lord Bankton in his *'An Institute of the Laws of Scotland'* (II, III, para. 83), both regarded as authoritative in Scottish courts of law. By way of example, John Riddell, who is cited by the *'Complete Peerage'* (the most authoritative work on the British peerage), in his *'Inquiry into the Law and Practice in Scottish Peerages'* (Thomas Clark, Edinburgh, 1842, Vol. I, p. 5), while showing that Scottish peerage claims were decided by the Court of Session, says: *'In feudal times, when peerages were connected with the fief, they were amenable to the civil court.'* The words *'when peerages were connected with the fief'* mean 'when peerages were attached to a designated area of land'; in other words, were territorial.

21. That given the undeniable fact that Scottish feudal barons most certainly were peers, the question becomes 'How and when did they cease to be peers?' Sir George Mackenzie of Rosehaugh, Lord Advocate, an institutional writer regarded as authoritative in Scottish courts of law, as quoted by Seton (*'The Law and Practice of Heraldry in Scotland'*, p. 294), states (Sir George Mackenzie of Rosehaugh*, 'Science of Heraldry'*, Anderson, Edinburgh, 1680, Chap. XXXI - *'Of Supporters'*, p. 94*) that feudal barons, who are referred to as the 'small barons', (my emphasis) *'were members of Parliament with us, as such, and never lost that privilege, though, for their conveniency, they were allowed to be represented by two of their number (in each shire)'*. *'members of Parliament with us'* means that they had to right to sit and vote in the Scottish Parliament as nobles (since they were neither clergy or representatives of the burghs - see below), which means that they were peers of Scotland before the Treaty of Union. So, *'*were' means that the small barons used to sit in Parliament as nobles, but no longer did so, even though their right to do so still existed at that time. But the fact that a right is no longer used does not mean that it has been legally abrogated, and Mackenzie confirms that it wasn't legally abrogated. Under the Treaty of Union peers of Scotland became peers of Great Britain.

**'Science of Heraldry'* was published in 1680, only 27 years before the Treaty of Union. In other words, if the small barons were peers in 1680, how did they cease to be peers between 1680 and 1707? And if they didn't cease to be peers in that period, they were still peers in 1707 and thus became peers of Great Britain under the terms of the Treaty of Union.

22. That in 1599 King James VI of Scotland (and I of England) wrote of the feudal barons in his *'Basilikon Doron'* (Book II) that *'the small barons are but an inferior part of the Nobilitie and of their estate'*. There were three estates in the Scottish Parliament; the clergy, the nobility and the representatives of the burghs (the towns). King James VI confirmed that the small or feudal

barons were of the estate of the nobility, which means that they had the right to sit and vote in Parliament as nobles. This makes them peers since the definition of a peer is someone who has the right to sit and vote in parliament as a noble (where the right derives from, be it a personal right or a right attached to land which a person owns, and how it is created, be it by letters patent, writ of summons or other means, is irrelevant; it is the right to sit and vote as a noble, and only that right, that matters*). Thus, the King himself personally confirmed that feudal barons were peers - but the Lord Lyon says that he was wrong. So, the logic is that feudal barons were peers of Scotland in 1599, that nothing happened between 1599 and 1707 to alter that status and that, as peers of Scotland in 1707, the feudal barons became peers of Great Britain in accordance with the terms of the Treaty of Union and have remained so ever since.

*R.P. Gadd, *'Peerage Law'*, ISCA Publishing, 1985, p. 2, defines a peerage as *'that dignity of nobility to which attaches the right to sit and vote in the House of Lords'*. There is no mention here of the way in which a peerage is created (by writ of summons, letters patent and so on) or the way in which a person is summoned to exercise that right; the right to sit and vote is all that matters. This should be obvious. Note that this definition pre-dates the House of Lords Act 1999. Note also that since the Scottish Parliament had no House of Lords, in a Scottish context the right can only be the right to sit and vote as a noble, which is the equivalent.

23. That, as stated in my original petition, there are at least four Scottish feudal baronies currently recorded on the Roll of the Peerage; the Dukedom of Rothesay*, the Earldom of Mar**, the Earldom of Sutherland***, and the Barony of Torphichen.****

*'*Complete Peerage*' (2nd Ed., Vol. XI, p. 208, n. b) states that this peerage *'must have been of a feudal or territorial kind*' (see also Vol. III, p.444, n. c). Of course, the Duchy has never ceased to be such and the title inherited by the current Prince of Wales must have been the original title because it was inherited by operation of the Act of 1469 (which applies to the original title) when the present monarch ascended the throne.

**'*Complete Peerage*', Vol. VIII, p. 397-433; Vol. VIII, p. 827-854; Vol. IX, p. 77-169.

***'*Complete Peerage*', Vol. XII, Part I, p. 546, 548, 549, 553 etc., which all show the nature of the earldom as a feudal title. For the grant of regality see *'Complete Peerage'*, Vol. XII, Part I, p. 555.

****'*Complete Peerage*', Vol. XII, Part I, p. 776.

24. That the Countess of Mar is one of the hereditary peers who sit and vote in the House of Lords.

25. That, on the basis that a Scottish feudal barony is a not a peerage, as advised by the Lord Lyon (and agreed by the Lord Chancellor, the Clerk of the Parliaments, the Lord Speaker and the Chairman of the Committee for Privileges), these four titles should be removed from the Roll of the Peerage and the Countess of Mar should be expelled from the House of Lords. It would be completely contradictory to refuse to include me on the Roll of the Peerage as a Scottish feudal baron but allow other Scottish feudal barons to remain on the Roll as such or to allow any of them to sit and vote in the House of Lords as such.

26. That under Scottish peerage law a peer can resign his peerage into the hands of the King for regrant to a new series of heirs (the descent of the peerage is altered, and this could include to someone unrelated by blood; a complete stranger). There is nothing to stop a peer from doing this for money, which means that the peer would, to all intents and purposes, be selling his peerage. An example is the sale of the Earldom of Wigtown by Thomas Fleming, 2nd Earl, to Archibald Douglas, Earl of Galloway in 1371/2 (*'Scots Peerage*', Vol. 8, p. 523). Halsbury, *'The Laws of England', Butterworth & Co., London, 1909, Vol. 22, p. 275* states: *'A Scottish peer could resign his dignity into the hands of the King, in order to extinguish it, or, which was usual, resign*

for a novodamus altering the course of descent.' In note b. Halsbury states: *'The power seems to have been abolished by the Union with Scotland Act 1706 (6 Anne c. 11).'* This cannot be correct (no-one is infallible, not even Halsbury) as it would be contrary to the fundamental presumption against taking away rights (that is, the abolition is not expressly stated or necessarily implied). Further, in a memorandum by the then Lord Advocate, the senior law officer of the Crown in Scotland, which appeared at Appendix 12 of a Report of a Joint Committee on House of Lords Reform in 1962, he observed (and in relation to the right of Scottish peers to resign their honours to the King for re-grant to a new series of heirs): *'On the whole I am of the opinion that the pre-Union procedure* [i.e. law] *has never been abrogated and is still legally competent'* (Sir Malcolm Innes of Edingight, Lord Lyon 1981-2001, *'Peers and Heirs'*, Scottish Genealogist, Sept. 1995, p. 99). This means that in 1995 a former Lord Lyon expressed the view that a Scottish peer can still resign his peerage into the hands of the King for re-grant to a new series of heirs, which, again, can be done for money.

27. That a number of Scottish peerages (Mar and Torphichen included) include assignees in the relevant destination clause, which allows the title to be alienated (including for money) without the consent of the King.

28. That if the Lord Lyons advice (as quoted above) is that any peerage that is alienable (can be sold or otherwise disposed of) is not a peerage, even if not a feudal title, then all Scottish peerages (whether feudal or created by letters patent) should be removed from the Roll of the Peerage, because they are all alienable, potentially for money, and any holders of Scottish peerages currently sitting in the House of Lords should be expelled.

29. That the Earldom of Mar was recognised as a peerage by statute (Earldom of Mar Restitution Act 1885), but if it was not already a peerage then Parliament did not make it one by that statute; the recognition would have been ineffective because the Act only recognised an existing peerage. The Act recognised *'the honours, dignities, and titles of peerage anciently belonging to or enjoyed and held with the territorial earldom of Mar…'*, so, if there was no title of peerage *'anciently belonging to or enjoyed and held with the territorial earldom of Mar'* then nothing was restored (*'Complete Peerage'*, 2nd Ed., Vol. IX, p. 164). *'Complete Peerage'*, 2nd Ed., Vol. IX, p. 167, states: *'Investigation into the preamble of the said Bill by the Select Committee of each House proved, to the satisfaction of Parliament, that this ancient Peerage was already, by the laws of Scotland, entailed on Lord Mar'*. This would be comparable to an Act which recognises as a peer someone who doesn't exist. Such an Act must be ineffective because the subject of the Act does not exist. The *'Complete Peerage'* (2nd Ed., Vol. IX, Appendix J, p. 169) says: *'in law and in fact, neither can a resolution of the House of Lords, nor can an Act of Parliament, nor can even the Crown call into existence or create a Peerage of Scotland.'* This must be because when a person is created a peer, he is created a peer of the realm and after the Treaty of Union, 'the realm' was Great Britain and then the United Kingdom, so, to have a peer of the realm who is only a peer of Scotland is an impossible contradiction. This means that the 1885 Act cannot have created a peerage of Scotland. (Note that the opposite arguments is that since the Act of 1885 recognised that a feudal barony, the Earldom of Mar*, is a peerage, that all other feudal baronies must also be peerages.)

    *All feudal earldoms and lordships were baronies because the lands were held *'per baroniam'* ('by barony') and they sat in Parliament by virtue of being barons.

30. That, in accordance with the statement in Mereworth v Ministry of Justice [2011] EWHC 1589 (Ch) (http://www.bailii.org/ew/cases/EWHC/Ch/2011/1589.html) at 12, the Committee has a duty to prevent anyone sitting and voting in the House of Lords who is not entitled to do so and

to correct the Roll of the Peerage as well, given that a Scottish peer on the Roll of the Peerage has a right to stand in an election of hereditary peers (my emphasis):

'What applies to the House of Commons applies equally to the House of Lords. This is illustrated by Viscountess Rhondda's claim [1922] 2 AC 339 where the House of Lords' Committee for Privileges considered the claim of Viscountess Rhondda to sit in the House of Lords. Her claim was based on the Sex Disqualification (Removal) Act 1919. Lord Birkenhead, the Lord Chancellor, said that it was the duty of the Committee to report into the question whether Viscountess Rhondda was entitled to receive a Writ of Summons. As he put it:

> *"The writ is not to be issued capriciously or withheld capriciously at the pleasure of the Sovereign or of this House. It is to be issued, or withheld, according to the law relating to the matter, and if, under that law, it appears that there is a debt of justice to the petitioner in that matter, the writ will issue and, if not, it cannot issue."*

Thus, the decision in that case about whether the law required a writ to be issued was a matter for the Committee for Privileges to decide. Lord Birkenhead also referred to the earlier decision of the Committee for Privileges in the Wensleydale Peerage Case [1856]. This was the case in which Sir James Parke, the distinguished judge of the Court of the Exchequer, was created a Life Peer but the House of Lords refused to allow him to sit and vote in the House because, they decided, that as the law then stood, the creation of Life Peers was not within the Crown's prerogative powers. It was in consequence of that that the law was changed by Act of Parliament to allow creation of Life Peers as the first Law Lords. The validity of the original creation was decided by the Committee for Privileges because it was a question of entitlement to sit and vote in the House.

Lord Lyndhurst, who spoke for the majority of the Committee, explained the procedure in column 1156 of the full text of the debate in the Committee for Privileges (which does not appear in the Law Reports themselves). What Lord Lyndhurst said was this:

> *"If a Writ of Summons is improperly withheld, your Lordships can insist upon its being issued. You may address the Crown for that purpose if you think proper. If that address to the Crown is unavailing, there is a remedy that in a remarkable case has been resorted to and which was effectual to attain its object. The Peers in Parliament, in that case, refused to proceed to business until the Writ of Summons was issued and until the House was properly constituted, and the historian who records this fact says that the means adopted were so effectual that the King was induced to issue the Writ of Summons and that the abuse of which they complained never occurred again. That is a remedy when the Writ of Summons is withheld. <u>On the other hand, when a party has obtruded himself upon the House in which he has no right to sit, the remedy is equally plain. It is your duty to direct your Officers to refuse to administer the oaths, or allow the party to take his seat."</u>*

Lord Lyndhurst also asserted, in clear terms, the right of the Committee to decide who was entitled to receive the Writ of Summons and, as indicated, he said that if a person is entitled to a writ, but the Crown does not issue one, then his remedy is to petition the House. That is the advice that the Crown Office gave Lord Mereworth in the present case and, in my judgment, that advice was correct. If the Committee for Privileges has jurisdiction, it seems to me that must be an exclusive jurisdiction to decide upon entitlement to sit and vote in the House, otherwise there would be a risk of conflicting decisions: on the one hand, those of the courts and, on the other, those of the Committee for Privileges which would not be conducive to the separation of powers inherent in our constitution.'

31. And Your Petitioner therefore humbly prays that Your Lordships will be pleased:

- to advise the Lord Chancellor, as keeper of the Roll of the Peerage, that the Dukedom of Rothesay, the Earldom of Mar, the Earldom of Sutherland, and the Barony of Torphichen, being Scottish feudal baronies, should be removed from the Roll of the Peerage;
- to instruct the Clerk of the Parliaments to remove relevant entries from the register of hereditary peers who wish to stand in any election of hereditary peers;
- to expel Margaret of Mar (Jenkin née Lane), 31st Countess of Mar, from the House of Lords;

on the basis that an alienable title is not a peerage, as advised by the Lord Lyon:

- to advise the Lord Chancellor, as keeper of the Roll of the Peerage, to remove all other Scottish peerages from the Roll of the Peerage;
- to instruct the Clerk of the Parliaments to remove all other Scottish peerages from the register of hereditary peers who wish to stand in any election of hereditary peers;
- to expel from the House of Lords any other Scottish peers currently sitting there who do not also have a peerage of Great Britain or the United Kingdom, namely:
    - Lucius Cary, 15th Viscount Falkland
    - Nicholas Fairfax, 14th Lord Fairfax of Cameron
    - James Lindesay-Bethune, 16th Earl of Lindsay
    - Malcolm Sinclair, 20th Earl of Caithness

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